WAD 2917
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8/21/92

BEFORE THE

WASHINGTON STATE POLLUTION CONTROL HEARINGS BOARD

NOTICE OF APPEAL

FILE COPY

Appellant:

Burlington Environmental Inc.
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Appellant's Representative:

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Appellee:

State of Washington
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Decision Appealed From:

Issuance of the RCRA Final Facility Permit for the Burlington Environmental Inc. Pier 91 Facility by the Department of Ecology, Burlington Environmental Inc. Identification No. WAD000812917.

Attachments To Notice of Appeal:

Exhibit 1: Department of Ecology letter dated July 22, 1992 to Burlington Environmental Inc. regarding issuance of RCRA Final Facility Permit for the Pier 91 Facility.

Exhibit 2: Permit for the Storage and Treatment of Dangerous Wastes issued to Burlington Environmental Inc. (Operator, Pier 91 Facility), and to the Port of Seattle (Owner, Pier 91 Facility) by the Department of Ecology, effective date August 26, 1992.

Exhibit 3: Cover page and Table of Contents from Application for RCRA Final Facility Permit for Storage and Treatment of Dangerous Waste for the Burlington Environmental Inc. Pier 91 Facility.

Exhibit 4: Burlington Environmental Inc. RCRA Part A Application for the Pier 91 Facility.

Exhibit 5: State required SEPA Environmental Checklist submitted by Burlington and DNS from Ecology pursuant to WAC 197-11-960.

Exhibit 6: State Accreditation documents for Burlington Environmental Inc. corporate laboratory.

Exhibit 7: Quality Assurance Program Plan for Burlington Georgetown Facility and Corporate Laboratory.

Background and Notice of Appeal.

Burlington Environmental Inc. (Burlington) operates a dangerous waste treatment and storage facility at Pier 91 (the facility) in Seattle, King County, Washington. The owner of the facility is the Port of Seattle (the Port). Burlington has applied to the State of Washington Department of Ecology (Ecology) for a dangerous waste storage and treatment permit in accordance with the Hazardous Waste Management Act, Chapter 70.105D RCW, and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, and the regulations issued pursuant to both the state and federal laws (collectively referred to as RCRA).

Ecology has issued a final Permit for the Storage and Treatment of Dangerous Waste (the Permit) to Burlington and the Port, the operator and owner of the Pier 91 facility respectively. The Permit is effective August 26, 1992 unless an appeal is filed with the Washington State Pollution Control Hearings Board (the PCHB) by August 21, 1992 or 30 days from the date of Ecology's decision to issue the Permit.

By filing this Notice of Appeal, Burlington is appealing certain provisions of the Permit. The PCHB is the proper forum for this appeal in that the appealed provisions have been identified by Ecology as being imposed under the

authority of State law. The identification of these provisions as being based upon State law is contained in the document "Delineation of State and Federal Authorities" which was not enclosed with the Permit. The specific issues pertinent to this appeal are identified in the following section.

Bases for Appeal.

Burlington appeals the specific provisions of the Permit identified below on one or more of the following bases:

1. The requirements in the Permit are outside the applicable jurisdiction of Ecology conferred by any pertinent provision of law;

2. Ecology has erroneously interpreted or applied the law;

3. Ecology has engaged in unlawful procedure or decision making process, or has failed to follow prescribed procedures;

4. The need for the Permit requirements and conditions is not supported by evidence that is substantial when viewed in light of the whole record; and/or

5. The Permit conditions are arbitrary and capricious.

A. Designation of the Port as a Permittee.

As has been stated previously, Burlington is the operator of the Pier 91 facility. The treatment and storage facility covers approximately 4 acres at Pier 91, which area Burlington leases from the Port (Burlington subleases a substantial portion of the leased premises. The RCRA Permit covers less than one acre.). The Port owns the facility and owns and controls approximately 120 acres adjacent and contiguous to the facility. Ecology has issued the Permit to both Burlington and the Port. Burlington, however, is identified in the Permit as the sole "Permittee" and, therefore, is primarily responsible for meeting all conditions and requirements of the Permit, including all requirements for corrective action and closure of solid waste management units as defined by RCRA.

For purposes of the Permit, Ecology, as directed by the United States Environmental Protection Agency (EPA) has defined the term "facility" to include approximately 124 acres owned and controlled by the Port (essentially all of Piers 90 and 91).

For purposes of the Permit, Ecology, as directed by the United States Environmental Protection Agency (EPA), has defined the term "facility" to include approximately 124 acres owned and controlled by the Port (essentially all of Piers 90 and 91). EPA recognizes that this definition of "facility" will greatly expand the facility area in relation to the portion leased by Burlington. And, because the Port has not been designated a Permittee under the Permit, Burlington is apparently to have primary responsibility under the Permit for addressing corrective action requirements on property which it has never owned, upon which it has never operated, and over which it has in the past had and will continue to have no control. Although it is possible that Burlington may have liability for migration of contaminants from the boundaries of its actual operating areas, except for its status as a lessee, it would have no other liability beyond its boundaries for property it does not own and upon which it has had no operations. In otherwords, if Burlington owned the property upon which it operates, EPA could not require this expanded definition of facility. Because the Port is the owner of the entire area, EPA can require the expanded definition. Placing the primary burden of corrective action and closure on Burlington because it is a lessee on Port-owned property as a condition of its Permit, however, is arbitrary and capricious and an erroneous application of the law.

The Port has owned and operated the property surrounding the actual facility for years. These areas have been used for a number of industrial activities which most likely have resulted in historical contamination and environmental degradation in the area. The Port should have full responsibility for corrective action if such areas are to be addressed in the context of the Permit. As such, the Port should be designated as a Permittee for purposes of corrective action activities which are required on property outside the boundaries of Burlington's actual operations.

It is important to emphasize that Burlington does not challenge here the authority of the EPA to include the entire 124 acres owned by the Port within the definition of "facility" for purposes of corrective action requirements

under RCRA. EPA guidance and current case law supports a definition of facility as "all contiguous property under the control of the owner/operator." Currently, Burlington is responsible only for corrective action on the leased premises which have RCRA interim status under the express terms of its consent order with EPA. If Ecology does not name the Port as a Permittee under the Permit, there is no basis for the expanded definition of facility and no basis for enforcing corrective action requirements under the Permit.

B. Required Use of Washington State Accredited Laboratory and Exemption of Certain Waste Streams from Lab Analysis.

Section II.A.6.ii of the Permit requires that wastes received at the Pier 91 facility undergo laboratory analysis performed by "a laboratory accredited by Washington State." This requirement is unreasonable, unnecessary and exceeds the legal requirements of Chapter 170-303 WAC. The provision cited as authority for this requirement is WAC 173-50 which relates to waste water treatment systems and is not relevant to RCRA facilities. Burlington has recently appealed this requirement in the context of the issuance of a final facility RCRA permit for the Georgetown facility because Ecology has no authority to establish this requirement in the context of waste analysis. In negotiations regarding the Georgetown permit appeal, Ecology has agreed to consider use of a quality assurance plan covering both the Burlington Georgetown facility and the Corporate Laboratory to be submitted by Burlington, rather than requiring use of a state accredited laboratory. This proposed plan is nearly identical to the existing Corporate Laboratory Quality Assurance Plan already approved by Ecology's Quality Assurance Section for State Laboratory Accreditation. If Burlington's quality assurance plan for the Georgetown facility RCRA permit is approved by Ecology,an equivalent quality assurance plan can be prepared and submitted for the Pier 91 facility. If such a plan were to be approved by Ecology, Section II.A.6.ii would no longer be appropriate or necessary and would exceed the legal requirements of other final permits. This provision should be revised to allow use of a laboratory with an Ecology-approved quality assurance plan, or, at a minimum, stayed pending Ecology's determination regarding the proposed quality assurance plan for the Georgetown facility.

Section II.A.6 of the Permit fails to acknowledge that specific types of waste streams are exempt from the need for laboratory analysis at the time of full characterization. The Permit should be amended to incorporate any waste streams that have been identified in the Permit application as qualifying for such an exemption.

C. PCB Analysis of Each Shipment of Incoming Waste.

Section II.A.12 of the Permit requires Burlington to screen each shipment of incoming waste for polychlorinated biphenyls (PCBs). This facility does not accept wastes containing quantifiable levels (greater than 2 ppm) of PCBs as defined by 40 CFR 761.20(e)(2), or regulated by WAC 173-303-071(3)(k), 510 and 515. Burlington requires all generators shipping waste materials to the Pier 91 facility to certify in writing that their wastes do no contain quantifiable levels of PCBs. This certification is in addition to the waste profile prepared for each generator's waste.

The requirements of Section II.A.12 would impose significant and unreasonable operational and cost constraints on the facility. The turnaround time for PCB analysis is approximately 24 to 48 hours. If wastes could not be accepted until the analysis is completed, trucks containing bulk wastes would be lined up on site for several days awaiting the results of lab analysis, resulting in increased demurrage costs and decreased customer service and response capability..

Ecology has recently indicated that the requirement is appropriate because Burlington's Permit application does not affirmatively state that the facility will exclude wastes containing PCBs and that the Part A application for the facility contains the dangerous waste code W001 (the State Sources code for wastes containing PCBs under WAC 173-303-9904). Burlington would agree to remove this waste code from the Permit in return for removal of the requirement to screen all incoming waste for PCBs, and asserts that current operational procedures are sufficient and appropriate in the interim pending such a modification.

D. Ignitability Testing Requirements

Section II.A.16 of the Permit requires that all analyses performed to determine the characteristic

ignitability or acceptable flashpoint of incoming wastes shall be performed in accordance with the most recent test methods in SW-846. This requirement is clear and acceptable on its face, however, recent interpretation of this requirement by Ecology (See Ecology Pier 91 Draft Permit Review Summary Report regarding the May 27, 1992 Permit Draft) has created serious ambiguity. Although the provision requires Burlington must prove that every waste stream analyzed for the ignitability characteristic has a flashpoint greater than 100 degrees Fahrenheit prior to acceptance at the facility. This interpretation would render this requirement unreasonable, unnecessary and arbitrary. Specifically, Burlington objects to being required to perform the "closed cup" flash point tests on wastes that clearly meet ignitability requirements based upon the standard ignitability screen. Burlington seeks clarification of this provision to require "closed cup" testing only on wastes that demonstrate low flashpoint in the primary screening.

E. Maintenance of Certain Records at Facility

Section II.C.1.d.v requires that all closure, interim measures and final corrective action cost estimates, financial assurance documents prepared pursuant to this Permit, as well as the company names and addresses of insurers be maintained (with all amendments, revisions and modifications) at the facility until closure and corrective action are completed and certified. This recordkeeping requirement is overly burdensome and unnecessary. The Permit should be revised to allow compliance with this recordkeeping requirement by reference to records maintained at Burlington's corporate office. These activities are directed and monitored by personnel in the regulatory, legal and technical engineering departments at the corporate office.

F. Clean Closure Requirements.

Section II.D.7 of the Permit sets forth the requirements for clean closure. Burlington objects to these requirements as unnecessary, unreasonable, and in excess of regulatory authority. Burlington has been advised that Ecology intends to issue a revised closure guidance which could have significant impacts on the Permit requirements for clean closure of the facility. For example, Burlington does not know currently whether it will be required to

demonstrate compliance with clean up standards based upon analytical or statistical methods. Further, analysis for and removal of all hazardous constituents listed in WAC 173-303-9905 at the time of closure is inappropriate and cannot be accomplished using current analytical technology. The Permit should be revised to allow appropriate clean closure levels to be established at the time of closure, based upon existing regulations and analytical technology, to address only the hazardous constituents that have been handled on site.

G. Tank Compliance Requirements.

Section IV.A.3 of the Permit fails to allow Burlington the option of an alternative tank design or modification to the existing "double bottom" design which would eliminate the closed interspace between tank bottoms and the need for periodic tightness testing, and is capable of collecting and detecting any leaked material within 24 hours as required under WAC 173-303-640. Ecology has indicated that they are not satisfied with the existing tank system design and would propose other alternatives to Burlington. Ecology has failed to propose such an alternative to the existing design and has failed to allow Burlington the option to propose a design alternative that will satisfy the regulatory requirements. As is consistent with Permit conditions IV.A.3 and IV.A.4, Burlington should be given the opportunity to develop and propose a design modification for submittal to Ecology with eight weeks of the effective date of the Permit and complete all necessary modifications within six months..

H. Construction Schedule.

Section IV.B.1 of the Permit requires Burlington to construct pursuant to a fixed schedule substantial discretionary improvements and additions to the facility. This condition is unreasonable and unnecessary to effect legal and regulatory requirements. Ecology has approved the design and construction of the items in IV.B.1. Burlington intends to construct the "loading/unloading area" as required by this Permit condition. However, an absolute requirement to construct the remaining discretionary items would require burdensome economic investment which is not required to achieve compliance with respect to permitted operations. This requirement should be revised to require

only construction of the loading/unloading pad. Burlington suggests another provision to cover the additional items which would require Burlington to notify Ecology 120 days prior to initiation of their construction. Once construction is commenced, Burlington would be required to complete construction within the time delineated in the Permit (Burlington would accept the time periods for completion of construction as established currently in the permit following the 120-day notice.)

I. General Compliance Requirements.

Section IV.C.4. requires Burlington to submit samples for analysis upon request by Ecology. Although Ecology has limited the frequency and number of such sample requests, Ecology has not identified the monitoring activity with which these sampling events are to be associated. This requirement is unreasonable and arbitrary. Ecology may request that Burlington submit samples for analysis under WAC 173-303-810(11) pursuant to a specified monitoring activity which will require certain parameters to ensure that data are representative of the monitored activity.

Request for Relief

With respect to the above provisions, Burlington requests the following relief:

A. The Port of Seattle as the owner of the Pier 91 Facility should be designated as a Permittee with respect to all requirements of the Permit relating to corrective action, closure, interim measures, financial assurance for corrective action and closure, and monitoring activities.

B. Section II.A.6.a.i. of the Permit should be revised to allow laboratory analysis in accordance with the proposed quality assurance plan to be submitted by Burlington with respect to each of its facilities.

C. Section II.A.12 of the Permit should be stayed pending modification of the Permit to eliminate W001 (PCBs) as a dangerous waste code under the Permit. Burlington agrees to submit such modification to Ecology within ninety (90) days of the effective date of the Permit.

D. Section II.A.16 of the Permit should be amended to clarify the conditions in which "closed cup" flashpoint testing is required to determine the acceptability of incoming wastes for treatment and/or storage at the facility.

E. Section II.C.1.d.v. of the Permit should be amended to allow Burlington to meet this requirement by reference to documents maintained at its corporate office.

F. Section II.D.7. of the Permit should be amended (1) to allow appropriate clean closure levels to be established at the time of closure based upon existing applicable regulations at that time and (2) to require that closure analysis be conducted on constituents that have been handled on site.

G. Section IV.A.3 of the Permit should be amended to allow Burlington to develop and submit for approval an alternative design modification for the tank system at the facility to meet the regulatory requirements of WAC 173-303-640.

H. Section IV.B.1. of the Permit should be revised (1) to allow for the construction of the loading/unloading pad and (2) to specify the following:

"If the Permittee determines to construct the following items as previously reviewed and approved by Ecology, Permittee will give Ecology 120 days notice prior to initiation of construction of any item. Once the construction of an item commences, Permittee shall complete construction of the particular item in accordance with the schedule established in this provision. (Schedule state in Permit Section IV.B.1.).

I. Section IV.C.4. of the Permit should be revised to specify the the monitored activity for which any samples are requested by Ecology under this Permit condition.

Statement Pursuant to WAC 371-08-075(6):

I, Marlys Palumbo, in accordance with WAC 371-08-075(6), affirm that I have read the foregoing Notice of Appeal and believe the contents to be true.

Respectfully submitted,

BURLINGTON ENVIRONMENTAL INC.

Marlys S. Palumbo
Attorney for Appellant